THE DOCTRINE OF DUE PROCESS OF LAW BEFORE THE CIVIL WAR.

[*Continued.*]

IV.

IT was not destined, therefore, that the doctrine of due process of law should enter the general constitutional jurisprudence of the United States through the Supreme Court of Alabama. Some court more zealous for private rights must be the one to receive the torch from the North Carolina court, and indeed one more generally conspicuous in the world of citation and precedent than either of the Southern courts. At the same time, the final fate of *Ex parte* Dorsey teaches us the character of the exigency that would force such a tribunal as the one described to take up with the doctrine of due process of law, namely, the advance of Iredell's doctrine of the plenary power of the legislature within the written constitution and the consequent gradual retirement into disuse of constitutional limitations based upon extra-constitutional grounds.

The accession of Taney to the Chief Justiceship of the Supreme Court marks an epoch in the history of American constitutional law, though perhaps somewhat less distinctly than is often supposed.[72] Marshall's guiding notion with respect to the national Constitution was, that it was intended to provide a realm of national rights subject to national control, a point of view from which state legislation limiting individual action became impertinence. Had the political branches of the national government been of Marshall's way of thinking all along, and willing, therefore, to assert the necessary degree of national control, perhaps this theory would have worked out very well even at that period. With the election of Jackson, however, the doctrine of States' Rights and strict construction laid a paralyzing hand upon the sources of national power. On the other hand, at the very same moment, what with the revival of revolution abroad and the rise of transcendentalism

[72] See Marshall in Wilson *v.* Blackbird Creek Marsh Co., 2 Pet. (U. S.) 245; and in Providence Bank *v.* Billings, 4 Pet. (U. S.) 514, 563.

at home, and last, but not least, the phenomenal success of the Erie Canal, the demand went forth for a large governmental programme: for the public construction of canals and railroads, for free schools, for laws regulating the professions, for anti-liquor legislation, for universal suffrage and for the abolition of slavery. I say "governmental programme," but what government? Necessarily the state governments, which must, therefore, be furnished with the adequate constitutional theory to carry it forward. It is true that the panic of 1837 struck off the first item of this programme, but, save in a way presently indicated, it does not seem to have affected permanently the development of constitutional theory. Taney became Chief Justice in 1836, bringing with him to the Supreme Bench the fixed intention of clothing the states, so far as a faithful adherence to precedent would allow, with the sovereign and complete right to enact useful legislation for their respective populations. In his great Charles River Bridge [73] decision, accordingly, Taney laid down the maxim that in a public grant nothing passes by implication, a doctrine which, as Story showed conclusively in his dissent, would have made the decision in the Dartmouth College case originally impossible, and which did in point of fact, in the decades following, pave the way for the great but necessary curtailment of the efficacy of that decision.[74] Again, in the License Cases,[75] Taney reveals his point of view by refusing to extend to the field of interstate commerce the principle of Marshall's decision in Brown *v.* Maryland [76] with reference to Congress' power over foreign commerce, namely, that that power is exclusive, and this Taney did in the very face of Marshall's *dictum* to the contrary. Finally, in this and in other opinions and decisions Taney diluted Marshall's doctrine of the paramountcy of national power within the sphere of its competence with the doctrine of the reserved sovereignty of the states, whereby he meant not merely that the states have left to them certain powers in consequence of their not being granted to the national government, which is all that the Tenth Amendment

[73] 11 Pet. (U. S.) 420 (1837).

[74] See particularly West River Bridge Co. *v.* Dix, 6 How. (U. S.) 507; Beer Co. *v.* Massachusetts, 97 U. S. 25; Fertilizing Co. *v.* Hyde Park, *ibid.* 659; Stone *v.* Mississippi, 101 U. S. 814, and Butchers Union Co. *v.* Crescent City Co., 111 U. S. 746; also see Murray *v.* Charleston, 96 U. S. 432.

[75] 5 How. (U. S.) 504 (1846).

[76] 12 Wheat. (U. S.) 419 (1827).

says, but that the states had an area of power which was positively reserved to them and which therefore no legitimate exercise of federal power could ever invade.[77]

But what was happening on the Supreme Bench was the index of what was happening also in the state judiciaries, where popular sovereignty and states' rights united to force a recognition of the plenitude of legislative power. One illustration of this I have already referred to, the disavowal by Ormond, J., of the Alabama Supreme Court in 1841 of his own line of reasoning of three years earlier. The case referred to was that of Mobile *v.* Yuille,[78] in which the question was the power of the legislature to authorize a municipality to regulate the weight and price of bread. The attorney for defendant in error was the reporter of *Ex parte* Dorsey, who, upon the basis particularly of Justice Ormond's opinion in that case, now "strenuously contended" "that no such power exists because [as he contends] it would interfere with the right of a citizen to pursue his lawful trade or calling in the mode his judgment might dictate," and also because such by-laws, being in restraint of trade, are void under the common law. But, rejoined Ormond, J., sweeping aside defendant's interpretation of *Ex parte* Dorsey, "in this case the power is expressly given by the statute to do the act complained of," wherefore what the common law ordains is not in point. For the rest,

> "the legislature having full power to pass such laws as is [*sic*] deemed necessary for the public good, their acts cannot be impeached on the ground that they are unwise or not in accordance with just and enlightened views of political economy, as understood at the present day . . . arguments against their policy must be addressed to the legislative departments of government."

Mobile *v.* Yuille, however, is a comparatively late case, and more than a decade earlier, some years even before Taney had become Chief Justice, a similar doctrine was struggling for recognition in the New York courts, whose dilemma, comprising as it did the tradition of judicial review created by Kent on the one hand, and the victorious principles of Jacksonian Democracy on the other, if it

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[77] See particularly the Chief Justice's opinions in Groves *v.* Slaughter, 15 Pet. (U. S.) 449, and Pollard *v.* Hagan's Lessee, 3 How. (U. S.) 212.

[78] 3 Ala. 137 (1841). See also State *v.* Maxey, 1 McMul. (S. C.) 501 (1837).

was rather painful, was also of the greatest possible importance in connection with the history of due process of law.[79] For the problem before the New York courts, from 1830 on, was precisely the problem that had confronted the North Carolina court a quarter-century earlier, namely, the problem of reconciling an adequate supervision over legislative power with due deference to the principle of legislative sovereignty within the written constitution. Naturally the North Carolina solution of this difficult problem seemed much to the point.

More specifically, the situation that confronted the New York courts was this: the power of eminent domain is rather the most invidious branch of governmental authority, even when exercised by the state directly. Within a very few years, however, hundreds and hundreds of private corporations organized for the business of transportation had been endowed by the state with this power. Kent's doctrine of consequential damages and the resultant blending, at their outer edges, of the police power and that of eminent domain, had already gone by the board in 1827 in the cases of Vanderbilt *v.* Adams [80] and Stuyvesant *v.* New York.[81] Kent's other doctrine, that the power of eminent domain is exercisable for a public purpose only, that is to say, for what the courts may regard as a public purpose, was also in grave danger of extinction, being first rested, by Chancellor Walworth, upon the untenable basis of the Obligation of Contracts clause of the federal Constitution [82] and then transferred again to its original position upon the doctrine of "natural rights" and the "spirit of the constitution." [83] But the doctrine of natural rights no longer sufficed either. What, then, was to be done? In Taylor *v.* Porter [84] an act author-

[79] For an excellent illustration of the difficulty created by the dilemma referred to, read Justice Nelson's opinion in People *v.* Morris, 13 Wend. (N. Y.) 329 (1835).

[80] 7 Cowen (N. Y.) 349.

[81] *Ibid.* 585. For the derivation of the doctrine of these cases from the common law, see 12 Mass. 220 (1815) and 1 Pick. (Mass.) 417 (1823), decisions which Kent pronounces "erroneous." 2 Comm. 339, note c. See also in condemnation of the same doctrine, Story, J., in his dissent in the Charles River Bridge Case, 11 Pet. (U. S.) 638, 641. See also Baker *v.* Boston, 12 Pick. (Mass.) 184 (1831), in which the doctrine of 7 Cow. (N. Y.) 349 and 585 is applied.

[82] Beekman *v.* Saratoga, etc. R. R., 3 Paige (N. Y.) 45 (1831).

[83] Albany Street Matter, 11 Wend. (N. Y.) 149 (1834); Bloodgood *v.* Mohawk, etc. R. R., 18 Wend. (N. Y.) 1 (1837).

[84] 4 Hill (N. Y.) 140; preceded, in 1839, by the Matter of John and Cherry Sts., 19 Wend. (N. Y.) 676. Besides the fact that the line of argument is more clearly cut

izing a private road under the eminent domain power was under review. The act was overturned; and Bronson, J., speaking for the majority of the court, annexed the doctrine of natural rights and of limitations inherent to legislative power to the written constitution by casting around that doctrine the phrase "law of the land" and the phrase "due process of law," which had also since 1821 been a part of the New York constitution.

Justice Bronson's line of argument is most instructive. Setting out with the proposition that the people alone are absolutely sovereign, he follows it up with the assertion that the legislature can exercise only such powers as have been delegated it, which is evidently either a restatement of the doctrine of limitations inherent to legislative power or an assertion that a state constitution, like the federal Constitution, is a grant of powers. Quotations from Story's opinion in Wilkinson *v.* Leland [85] make it evident that it is the former, as does also the invocation of the social compact at this point. But it is a phrase of the written constitution that Bronson, J., is in particular search of. Fortunately the decision in Hoke *v.* Henderson is at hand, recommended by Kent in a recent edition of his Commentaries as "replete with sound constitutional doctrines." On the strength of Hoke *v.* Henderson, accordingly, "law of the land" is asserted to mean that before a man can be deprived of his property "it must be ascertained judicially that he has forfeited his privileges, or that someone else has a superior title to the property he possesses." But if there is doubt as to the meaning of the phrase "law of the land," at least there can be none as to that of "due process of law" of the same article of the constitution; for this means nothing "less than a proceeding or suit instituted and conducted according to prescribed forms and solemnities for ascertaining guilt or determining the title to property." One exception to this definition is indeed furnished by the case of an exercise of the power of eminent domain, when due process of law means due compensation. The eminent domain power, however, can be exercised only for a public purpose. But who is to

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in Taylor *v.* Porter, citation also makes it the more important case by far. *Cf.* Harvey *v.* Thomas, 10 Watts (Pa.) 63, and the Pacopson Rd. Case, 16 Pa. St. 15 (1851). For Kent's view of Hoke *v.* Henderson, quoted immediately below, see 2 Comm. (Ed. of 1840) 13, note *b*.

[85] 2 Pet. (U. S.) 657 (1829).

ascertain whether a given purpose is a public one or not? Justice Bronson's evident assumption — and it is only assumption — is that it is the courts, as preliminary to their task of determining whether due process of law has been observed. Nelson, J., dissented; at the same time, however, he accepted the general principle of the decision, but confessed that he was uncertain as to what grounds it rested upon.

Taylor *v.* Porter, on account of the special character of the enactment there reviewed, is to be classified with University of North Carolina *v.* Foy. It was followed in 1849 by White *v.* White,[86] in which a general statute was pronounced void and which therefore stands very closely coincident with Hoke *v.* Henderson. The statute in question removed the disability of married women under the common law in the control of their property. As an exercise of legislative power it was closely analogous to the statutes enacted early in our national history abolishing the right of primogeniture, statutes which, as we have seen, received enforcement even against rights of succession vested at the time of their passage. But the *virus* of natural law had spread since those days. In the first case, Holmes *v.* Holmes,[87] in which the Married Women's Act is challenged successfully, the decision was put upon the Obligation of Contract clause of the federal Constitution. But Mason, J., who decided White *v.* White, was very justifiably sceptical of the reasoning by which this result was attained. He accordingly decided to avail himself of the Due Process of Law clause and the doctrine of natural rights, citing the Albany Street case, Wilkinson *v.* Leland, and Taylor *v.* Porter indifferently. Eventually this decision also was superseded by decisions upholding the Married Women's Act but confining its operation to property acquired subsequently to the passage of the act. The cases in question were those of Perkins *v.* Cottrell [88] and Westervelt *v.* Gregg,[89] in the former of which the decision was based upon the doctrine of vested rights, the Obligation of Contracts clause of the federal Constitution, and the "spirit of the constitution which declares" that no

[86] 5 Barb. (N. Y.) 474.

[87] 4 Barb. (N. Y.) 295.

[88] 15 Barb. (N. Y.) 446 (1851).

[89] 12 N. Y. 209 (1854). See also the case of Powers *v.* Bergen, 6 N. Y. 358, in which use is made of the Law of the Land clause of the Constitution to overturn a special act of legislation.

person shall be deprived of life, liberty or property without due process of law; and in the latter, explicitly upon the Due Process of Law clause: "such an act as the legislature may, in the uncontrolled exercise of its power, see fit to pass, is in no sense," said the court, "the due process of law designated by the constitution." Similar acts were similarly construed in other states, but generally upon the ground that their prospective operation had been plainly intended by the legislature itself.[90]

V.

And thus by adopting the North Carolina doctrine of "law of the land" *pro tanto*, the New York courts, in 1843, rescued from disuse the doctrine of public purpose in connection with the power of eminent domain, and ten years later succeeded in drawing the teeth of the Married Women's Property Act. The real tussle with the reforming tendencies of the period was, however, yet to come. During the decade 1846 to 1856 no fewer than sixteen states passed anti-liquor laws of a more or less drastic character. Never since the doctrine of vested rights had been formulated had such reprehensible legislation, from the standpoint of that doctrine, been enrolled upon the statute books. How was it to be withstood? Some of the earlier of these laws took the form of local option measures, and to meet these a new dogma of constitutional law, drawn originally from John Locke's Second Treatise on Civil Government, was invented, namely, the doctrine that the legislature cannot delegate its power, — an utterly absurd doctrine, at least in this application of it, and one which was in singular contradiction both with legislative practice anterior to 1846, and with judicial decision.[91]

[90] *Cf.* 24 Ala. 386 (1854); 43 Ill. 52 (1857); 28 N. J. L. 219 (1860); 20 Oh. St. 128; with 34 Me. 148 (1852), and 8 Fla. 107 (1858); in the latter two cases the doctrine of vested rights plays its part.

[91] The courts to whose fertility of mind is due this doctrine were those of Delaware and Pennsylvania. See Rice *v.* Foster, 4 Harr. (Del.) 479 (1847), and Parker *v.* Commonwealth, 6 Pa. St. 507 (1847). The doctrine is refuted in People *v.* Reynolds, 10 Gilman (Ill.) (1848), and in Bull *et al. v.* Read, 13 Gratt. (Va.) 78 (1855). Also in Johnson *v.* Rich, 9 Barb. (N. Y.) 680 (1848), with which however *cf.* Barto *v.* Himrod, 8 N. Y. 483. For the contradictory position of the Delaware and Pennsylvania courts *cf.* Rice *v.* Foster with 3 Harr. (Del.) 335 and 4 Harr. (Del.) 82; and Parker *v.* Commonwealth with 8 Barr (Pa.) 391 and 10 Barr (Pa.) 214. The Pennsylvania court subsequently abandoned the dogma, in connection with local option legislation, in Locke's

Furthermore, as was immediately shown, it was generally an utterly futile doctrine; for the easy retort of the reforming legislatures was state-wide prohibition.

Such a law was enacted by the New York legislature in 1855. It forbade all owners of intoxicating liquors to sell them under any conditions save for medicinal purposes, forbade them further to store such liquors when not designed for sale in any place but a dwelling house, made the violation of these prohibitions a misdemeanor, and denounced the offending liquors as nuisances and ordained their destruction by summary process. In the great case of Wynehamer *v.* State of New York,[92] which comprises a new starting point in the history of due process of law, this act was overturned, the essential ground of the decision being that the harsh operation of the statute upon liquors in existence at the time of its going into effect comprised an act of destruction not within the power of government to perform, "*even by the forms which belong to due process of law.*" [93] The significance of this statement of the matter is this: in every previous case of due process of law the court had had its opportunity in treating a civil enactment as, in certain applications, a bill of pains and penalties. In Wynehamer *v.* State of New York, however, the court was confronted with a frankly penal statute which provided a procedure, for the most part unexceptionable, for its enforcement. That statute was none the less overturned under the Due Process of Law clause, which was thereby plainly made to prohibit, regardless of the matter of procedure, a certain kind and degree of exertion of legislative power altogether. The result is obvious, even if somewhat startling, and it serves to bring into strong light once more the dependence of the derived notion of due process of law upon extra-constitutional principles; for it is nothing less than the elimination of the very

Appeal, 72 Pa. St. 491. For a very early Pennsylvania case in which the doctrine was offered to the court but ignored, see 2 Yeates (Pa.) 493 (1799); a later Massachusetts case in which the same idea was brought forward but specifically repelled by the court, is that of Wales *v.* Belcher, 3 Pick. (Mass.) 508 (1827). The immediate responsibility for this absurdity must fall to Gibson, C. J., in which connection see 5 W. & S. (Pa.) 281 (1843). The passage from Locke's work is § 141. On the history of the referendum, see E. P. Oberholtzer, Referendum in America.

[92] 13 N. Y. 378 (1856).

[93] A. S. Johnson, J., 420: "The legislature cannot make the mere existence of the rights secured the occasion of depriving a person of them even by the forms which belong to 'due process of law.'"

phrase under construction from the constitutional clause in which it occurs. The main proposition of the decision in the Wynehamer case is that the legislature cannot destroy by any method whatever what by previous law was property. But why not? To all intents and purposes the answer of the court is simply that "no person shall be deprived of life, liberty or property."

But how can the elimination of the phrase "due process of law" from the constitutional clause be regarded as furnishing a new starting point in the history of the development of that clause? The answer is that from now on the attention of the courts is drawn to the other words of the clause; more particularly to the words "liberty" and "property" and the word "deprive." Indeed the attention is seen to shift to these terms on this very occasion, in the case of the dissenting opinion of T. A. Johnson, J., who bases his argument against the decision partly upon his construction of the word "deprived" and partly upon a *reductio ad absurdum* involving the term "liberty." The word "deprive," he contends, is used in the constitutional clause,

"in its ordinary and popular sense, and relates simply to divesting of, forfeiting, alienating, taking away property. It applies to property in the same sense that it does to life and liberty and no other. . . . When a person is deprived of his property by due process of law the thing itself . . . with the legal title is taken away. . . . The act itself does indeed . . . directly provide for depriving the owner of his property by forfeiture and destruction, but that is where it is kept for an unlawful purpose and after trial and judgment. That provision has no bearing upon the question under consideration. When property is taken from the owner and destroyed, he is deprived of it by virtue of the act, not before. It might be urged with precisely the same pertinency and force, that a statute which prohibits certain vicious actions and declares them criminal deprives persons of their liberty and is therefore in derogation of the constitution."

Undoubtedly Johnson, J., reveals a grave danger attending the decision he is criticizing. For the moment the danger was not practically serious on account of the conservative view taken by the court of "property," which is defined by implication as the valuable use of the thing possessed. But let "property" come to mean — as indeed it does in this very case with one or two of the judges — any particular item of such right, for example, the right

of sale; let "liberty" be made to signify the rights which one enjoys in the community under the standing law, and the decision in this case, together with the distinction between regulation and destruction upon which it is based, becomes immediately untenable and a new solution of the eternal issue between legislative sovereignty and private rights at once imperative. But what line is this solution to take? Must outright choice be made between, on the one hand, allowing the legislature to destroy or even to regulate at discretion or, on the other hand, absolutely tying the hands of the legislature as in Hoke *v.* Henderson? Or is there a midway course? By construing the word "deprive," Johnson J., pointed the way, though no doubt unintentionally, to such a midway course and so provided an escape from the difficulty which it was his purpose merely to expose.

But at another point also is the Wynehamer decision a starting point. As we have just seen, the decision rests upon an alleged distinction between regulation and destruction: but are regulation and destruction two such different things, or is the latter often merely consequential upon the former? Common sense inclines to the latter view. Yet admit this view and what becomes of Marshall's famous maxim, that "questions of power do not depend upon the degree to which it is exercised?" In this connection a remark of Comstock, J., becomes of greatest significance in view of modern developments. "We," he contends, "must be allowed to know what is known by all persons of common intelligence, that intoxicating liquors are produced for sale and consumption as a beverage. . . ." Here is the first assertion of that doctrine of "judicial cognizance" which lies at the very basis of the modern flexible idea of "due process of law." [94] Questions of power do to-day emphatically depend upon the degree to which it is exercised, and this because the courts are able to take cognizance of facts which make different degrees of power harmonious with the "due process of law" requirement in different cases.

The last feature of the Wynehamer decision that I desire to call attention to is the fact that by it the New York Court of Appeals finally dismisses the doctrine of natural rights from the firing line as a defender of property. The ungracious task falls to Com-

[94] See the Lochner case, *supra*; also *In re* Jacobs, 98 N. Y. 98 (1885). *Cf.* Powell *v.* Pennsylvania, 127 U. S. 678 (1887).

stock, J., whose opinion heads the others, and he performs it with great considerateness. He says:

"It has been urged upon us that the power of the legislature is restricted not only by the express provisions of the written constitution but by limitations implied from the nature and form of our government; that aside from all special restrictions the right to enact such laws is not among the delegated powers of the legislature, and that the act in question is void as against the fundamental principles of liberty and against common reason and natural rights."

Moreover, he admits that "high authority has been cited" for these views, and himself quotes at length from Justice Chase's opinion in Calder *v.* Bull, which quotation he follows up with citations of Fletcher *v.* Peck, Dash *v.* Van Kleek, and Taylor *v.* Porter. He then proceeds to furnish us with his own point of view in the following words:

"I entertain no doubt that, aside from the special limitations of the constitution, the legislature cannot exercise powers which are in their nature essentially judicial or executive. These are by the constitution distributed to the other departments of the government. It is only 'legislative power' which is vested in the Senate and Assembly. But where the constitution is silent and there is no clear usurpation of the powers distributed to the other departments, I think there would be great difficulty and great danger in attempting to define the limits of this power. Chief Justice Marshall said [Fletcher *v.* Peck]: 'how far the power of giving the law may involve every other power in cases where the constitution is silent never has been and perhaps never can be definitely stated.' That very eminent judge felt the difficulty; but the danger was less apparent then than it is now when theories, alleged to be founded in natural reason and inalienable rights, but subversive of the just and necessary powers of government attract the belief of considerable classes of men, and when too much reverence for government and law is certainly among the least of the perils to which our institutions are exposed. I am reluctant to enter upon this field of inquiry, satisfied as I am that no rule can be laid down in terms which may not contain the germs of great mischief to society, by giving to private opinion and speculation a license to oppose themselves to the just and legitimate powers of government. Nor is it necessary to push our inquiries in the direction indicated. There is no process of reasoning by which it can be demonstrated that the 'act for the prevention of intemperance, pauperism and crime,' is void upon principles and theories

outside the constitution, which will not also and by an easier deduction, bring it in direct conflict with the constitution itself."

This surely is a remarkable passage betwixt the Scylla and Charybdis of tweedle-dee and tweedle-dum. What it all comes to is this: Comstock, J., dismayed by the abolitionists' quoting the same scripture to their purpose, refuses to annex the doctrine of natural rights to the written constitution, save only as a protection of property rights, that is to say, of vested rights; and generally speaking, this is always the significance of the doctrine of due process of law.

VI.

But now let us inquire how the doctrine of the Wynehamer decision accorded with the general constitutional law of the period. Within a year or two either side of the New York case similar cases involving similar questions arose in an even dozen states, and in all these states, save one, laws very closely analogous to the New York statute, or indeed sometimes more drastic in their provisions than that statute, were sustained. With reference to these cases two facts of foremost importance immediately present themselves. The first is that in only one case, and that occurring subsequently to the New York decision, is any argument against the body of the statutes under review based upon the Due Process of Law, or Law of the Land clauses of the constitution involved. The second is that the decisions, save in two or three instances, are based upon views of the police power which leave the definition of that power essentially to legislative discretion. Both these facts demand illustration from the cases themselves.

In State *v.* Noyes,[95] a New Hampshire case, a municipal ordinance pronouncing bowling alleys a nuisance and discontinuing those in existence was under review. The constitutional question raised is precisely the same as that raised by the provision of the New York statute which pronounced existing stocks of liquors nuisances. The attorney for Noyes urged that the question of what is a nuisance is a question of law and therefore for the courts. But, said the court, we have the law before us.

[95] 10 Foster (N. H.) 279 (1855). See also *ibid.* 286, also 289.

"The legislature do not exceed their legitimate authority when they make a change of laws and constitute that an offense which was not such before. . . . There may be an apparent unfitness sometimes in such legislation, but its validity has never been questioned."

In all the other cases the statutes involved were anti-liquor enactments, the arguments against which were based either — though but timidly on account of the attitude of the United States Supreme Court — on the Commerce clause of the federal Constitution or on the doctrine of natural rights. The latter argument was used in Beebe *v.* State,[96] an Indiana case, and the statute was overturned, Perkins, J., holding in a remarkable opinion that the right to manufacture, the right to sell, and the right to drink, spirituous liquors were inalienable rights. This decision, however, accompanied as it was by a well-argued dissent, marked the exception to the rule. In Lincoln *v.* Smith,[97] a Vermont case, a similar line of argument was taken by attorneys but was decisively rejected by the court. "Every member of society," runs the first article of the Vermont Bill of Rights, "hath a right to be protected in the enjoyment of life, liberty and property." But said the court in comment, "We do not well see how it can be claimed that the act in question is a violation" of this article, "unless it be assumed that the law is invalid, which is the very thing in question." Natural rights, the court continues, are subject to the civil law, and quotes Blackstone to the effect that certain rights are "absolute and inherent" and "without any control or limitation save only by the laws of the land." But the statute under review is law of the land unless invalid. The court proceeds to point out,

"The right to life, liberty, and property are all placed in the same connection; and certainly the two former are as sacred as the latter; although they have not seemed at all times to have called out the same legal acumen in their behalf as the latter."

Of similar purport is the decision of the Supreme Court of Illinois in Goddard *v.* Jacksonville.[98] Natural rights are surrendered or modified upon entering into the social compact. This surrender and modification, such as are indispensable to good government and the wellbeing of society, are comprehended under the police power of the government. "The framers of *Magna Carta* and of the

[96] 6 Ind. 501 (1855). [97] 27 Vt. 328 (1854). [98] 15 Ill. 589 (1854).

constitutions of the United States and of the states never intended to modify, abridge, or destroy the police powers of government. They only prohibited its exercise by *ex post facto* laws and regulated the mode of trial for offenses." Finally, the court argues, the police power must be recognized as a developing power, a power which unfolds with the increasing complexity of society and the advance of social needs. These decisions belong to the years 1854 and 1855. That of State *v.* Gallagher,[99] however, in which the Michigan Supreme Court defines legislative power even more broadly if possible, was rendered in 1856 and some weeks after the Wynehamer decision. The attorneys for Gallagher based their argument both upon the doctrine of natural rights and the derived doctrine, that the legislature has only "legislative power," of which it is therefore for the court to prescribe the limits. The court rejects both arguments. The opinion runs:

"The whole sovereignty of the people is conferred upon the different departments of government; what the judiciary and executive have not would seem from necessity to have been granted to the other; and that other must possess all the powers of a sovereign state except such as are withheld by the state constitution and such as are conceded to the general government. In that grant there are many powers that are not strictly legislative and which are essential to administrative government. If this department is limited as a law-making power, what is the limitation upon the exercise of those powers strictly administrative? . . . It must be conceded there is none."

But let us consider more particularly the attitude revealed by the courts in these decisions toward due process of law. A good illustrative case anterior to the Wynehamer decision is the Massachusetts case of Fisher *v.* McGirr.[100] Said Shaw, C. J., in his decision:

"We have no doubt that it is competent for the legislature to declare the possession of certain articles of property, either absolutely or when held in particular places and under particular circumstances, to be unlawful because they would be injurious, dangerous, and noxious; and by due process of law, by proceedings *in rem*, to provide both for the abatement of the nuisance and the punishment of the offender, by the

[99] 4 Gibbs (Mich.) 244 (1856). See also 3 Gibbs (Mich.) 330 (1854).
[100] 1 Gray (Mass.) 1 (1854).

seizure and confiscation of the property, by the removal, sale, or destruction of the noxious article."

Still more in point, however, is the language of the opinions in State *v.* Paul [101] and State *v.* Keeran,[102] which the Rhode Island Supreme Court decided with the Wynehamer decision before it and indeed with particular animadversion to that decision. With reference to attorney's argument based upon the derived view of the Law of the Land clause, the court said:

"It is obvious that the objection confounds the power of the assembly to create and define an offense with the rights of the accused to trial by jury and due process of law . . . before he can be convicted of it."

Later the court enters protest against —

"the loose habit of taking constitutional clauses, which from their history and obvious purpose have a well defined meaning, away from all their natural connections, and by drawing remote inferences from them, of pressing them into the service of any constitutional objection which the ingenuity or fancy of the objector may contrive or suggest," —

a practice which has gone far, it thinks, to bring constitutional questions into "jest and ridicule." But surely, it continues,

"if any clause in the constitution has a definite meaning which should exclude all vagaries which render courts the tyrants of the constitution, this clause [law of the land] . . . can claim to have [it] both from its history and long received interpretation."

It is urged that it limits the legislature in regulating the vendability of property.

"Pushed to its necessary conclusions the argument goes to the extent, that once make out that anything real or personal is property, as everything in a general sense is, and legislation as to its use and vendability . . . must stop at the precise point at which it stood when the thing first came within the protection of this clause of the constitution."

A better reasoned or more conclusive refutation of the derived doctrine of due process of law, both from the standpoint of logic and history, could not well be asked for.

Thus the Wynehamer decision found no place in the constitutional

[101] 5 R. I. 185 (1858).

[102] *Ibid.* 497. See also 3 R. I. 64 (1854); also *ibid.* 289.

law that was generally recognized throughout the United States in the year 1856. Neither had it been foreshadowed by decisions in similar cases in other States, nor was it subsequently accepted in such cases. Also it met locally an immense amount of hostile criticism, both lay and professional. Altogether it must be considered an adversity, for the time being, to the derived doctrine of due process of law. All that was needed apparently to dispose of that doctrine at once and for all time was another such Pyrrhic victory: nor was such event long impending.

Just as the Court of Appeals of New York had persuaded itself that it must intervene to save the proprietors of spirituous liquors from the too harsh hand of legislative wrath, so also the Supreme Court of the United States had convinced itself that "the peace and harmony of the country" was to be preserved only by its "settling by judicial decision" the question of slavery in the territories adversely to the power of the National Legislature. It came about, therefore, that exactly a twelvemonth after the Wynehamer decision, Taney, C. J., read his famous opinion in Scott *v.* Sanford,[103] pronouncing the Missouri Compromise to have been void under the Due Process of Law clause of the Fifth Amendment of the United States Constitution. His language is as follows:

"An act of Congress which deprives a citizen of the United States of his liberty or property merely because he came himself or brought his property into a particular territory of the United States and who had committed no offense against the laws could hardly be dignified with the name of due process of law."

The extraordinary character of this pronouncement is shown by two circumstances: first, the fact that counsel at the bar did not allude in the remotest way to any such restriction upon Congressional power; and secondly, by the fact that at this point the Chief Justice carries with him only two of his associates, Grier and Wayne, both of whom present but short opinions accepting perfunctorily the Chief Justice's line of argument. Daniel, Campbell, and Catron, JJ., also held the Missouri Compromise to have been unconstitutional but upon far different grounds, Catron availing himself of the doctrine of the equality of the states, and Campbell and

[103] 19 How. (U. S.) 393 (1857).

Daniel — and particularly the former — of Calhoun's doctrine of state sovereignty and the correlative doctrine that Congress is but the agent of the states in the exercise of its delegated powers. Furthermore, at no other point is Justice Curtis' dissent more convincing than in his refutation of this use of the term "due process of law." Already two years earlier Curtis, J., speaking for the court in Murray *v.* Hoboken Land and Improvement Co.,[104] had ruled that legal process is not necessarily due process, and that the due process required by the Fifth Amendment means the processes of the common and statute law as these stood at the time of the adoption of the Constitution, that Congress in providing procedure for the enforcement of its acts must provide the procedure that is due. But no question of procedure was at issue in connection with the Missouri Compromise. How then could the Fifth Amendment be invoked? If the Missouri Compromise did indeed comprise one of a class of legislative enactments proscribed by the Fifth Amendment, what then, inquired Curtis, J., was to be said of the Ordinance of 1787, which Virginia and other states had ratified notwithstanding the presence of similar clauses within their constitutions? What again was to be said upon that hypothesis of the act of Virginia herself passed in 1778, which prohibited the further importation of slaves? What was to be said of numerous litigations in which this and analogous laws had been upheld and enforced by the courts of Maryland and Virginia against their own citizens who had purchased slaves abroad, and that without anyone's thinking to question the validity of such laws upon the ground that they were not law of the land or due process of law? [105] What was to be said of

[104] 18 How. (U. S.) 272 (1855). See also Justice Curtis' opinion in Greene *v.* Briggs, 1 Curt. (U. S.) 311. See also Johnson, J., in Bank of Columbia *v.* Okely, 4 Wheat. (U. S.) 235 (1819): The words "law of the land" (of the Maryland constitution) "were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principles of private rights and distributive justice." The purport of this vague *dictum* has been much abused by late writers and judges: see, for example, Cooley, Const. Lim. 355, where it is praised as a "terse" and "accurate" statement. Bank of Columbia *v.* Okely involved only questions of procedure, and procedure is all that Johnson, J., had in mind, as is shown by his remark shortly afterward: "the forms of administering justice and the duties and powers of courts . . . must ever be subject to legislative will." 4 Wheat. (U. S.) 245.

[105] Citing 5 Call (Va.) 425; 1 Leigh (Va.) 172; and 5 Harr. & J. (Md.) 107. See Murray *v.* McCarty, 2 Munf. (Va.) 393 (1811), applying and enforcing the act of 1792, similar in purport to that of 1778.

the Act of Congress of 1808 prohibiting the slave trade, and the assumption of the Constitution that Congress would have that power without its being specifically bestowed, but simply as an item of its power to regulate commerce? What, again, was to be said of the Embargo Act, if the scope of Congressional authority to legislate within the limits of powers granted it was restricted by the Fifth Amendment; and what, finally, was to be said of a recent decision of the Supreme Court itself upholding in principle at least the claim of power represented by the Embargo Act?[106] Such were some of the questions which Curtis, J., put, to which obviously the Chief Justice's easy assumption of the point to be proved afforded no answer at all.

VII.

With Chief Justice Taney's decision in the Dred Scott case the story of Due Process of Law anterior to the Fourteenth Amendment comes practically to a close. Proceeding to gather up our results, we discover at once that the most conspicuous fact about our constitutional law as it stood on the eve of the Civil War was the practical approximation of the police power of the states to the sovereignty of the state legislatures within their respective constitutions, the purpose of which constitutions was universally held to be not to grant power, but to organize and limit powers which were otherwise plenary.[107] But while this was the general rule, due in part to the temporary eclipse of the judiciary and in part to the dominance of the notion of States Rights, yet there survived a number of restrictive principles, now in a state of suspended animation, so to speak, but easily susceptible of resuscitation. And one of these was the doctrine of "due process of law," whose title to continued vitality may be put upon the following grounds: First, the availability imparted to the Due Process of Law clause by the decision in Murray *v.* Hoboken Land and Improvement Co., as a constitutional buffer in connection with summary and administrative proceedings, a function hitherto subserved almost entirely

[106] United States *v.* Marigold, 9 How. (U. S.) 560.

[107] See particularly Redfield, C. J., in Thorpe *v.* Rutland, etc. R. R. Co., 27 Vt. 140 (1854).

by the Trial by Jury clause;[108] secondly, the steady extension, even among courts the most attached to the doctrine of legislative sovereignty, of the notion of "law of the land" and "due process of law" as equivalent to "general law" and as therefore inhibiting "special legislation";[109] thirdly, the equivalence established in Taylor *v.* Porter between "due process of law" and "due compensation" in questions of eminent domain; fourthly, the growing practice, for example, on the part of critics of the Dred Scott decision, to shift construction from the phrase "due process of law," to the terms "liberty" and "property" of the constitutional clause;[110] fifthly, the tendency of these terms, as shown in Ormond, J.'s opinion in the Dorsey case and in Hubbard, J.'s opinion in the Wynehamer case, to take on a progressively broader signification;[111] sixthly, the fact that the Massachusetts Supreme Court, owing to the formula by which power is vested by the Massachusetts constitution in the legislature to pass "all manner of wholesome and reasonable" laws, had never ceased to describe the police power, even when according it the broadest possible field of operation, as a power of "reasonable" legislation;[112] seventhly, the fact that the courts of New York had never surrendered the notion of legislative power as inherently limited;[113] eighthly, the fact that no court had *eo nomine* cast overboard the doctrine of vested rights;[114] ninthly, the fact that all courts generally described the police power, though without any apparent intention as yet of making such description a judicially enforceable limitation,

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[108] See the excellent old United States Digest, by Metcalf and Perkins (Boston, 1847), I, 562–564, Tit. "Constitutional Law," cap. "Right of Trial by Jury."

[109] See particularly Coulter, J., in Ervine's Appeal, 16 Pa. St. 263 (1851); and Christiancy, J., in Sears *v.* Cottrell, 5 Mich. 251 (1858).

[110] See the Republican Platform of 1860, paragraph 8.

[111] See a remark of the court in Board of Excise *v.* Barrie, 34 N. Y. 657 (1866), on "inconsiderate *dicta*" in the Wynehamer decision.

[112] See Massachusetts Constitution, Pt. II, Ch. I, Art. IV; Shaw, C. J., in Commonwealth *v.* Alger, 7 Cush. (Mass.) 53 (1851); State *v.* Gurney, 37 Me. 156 (1853). In this connection an utterance of the Massachusetts court with reference to police regulation of property rights has oftentimes been cited from the decision in Austin *v.* Murray, but without the least warrant, since the regulation referred to was by municipal by-law. The constitutional provision comes from the colonial charter of 1691.

[113] See particularly Sill *v.* Corning, 15 N. Y. 297 (1857), and People *v.* Draper, *ibid.* 532.

[114] See, for example, Miller, J., in Bartemeyer *v.* Iowa, 18 Wall. (U. S.) 129 (1874).

in terms of its historical applications;[115] tenthly, and lastly, the fact that similarly the police power was often grounded upon the common-law maxim *sic utere tuo ut alienum non laedas*,[116] a definition which like the historical definition bore with it the possible implication that the police power was a peculiar kind of power, exercisable constitutionally only for peculiar ends.

But now in this enumeration we have included many, if not all, of the essential elements of the modern flexible doctrine of due process of law. True, the proper admixture of these elements had not as yet in 1860 been suggested, but that it would be in the course of time, with the legislatures pressing upon the courts from one side and private interests from the other, who could doubt?

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[115] See Lincoln *v.* Smith, Goddard *v.* Jacksonville, *supra.*

[116] Thorpe *v.* Rutland, etc. R. R. Co., Commonwealth *v.* Alger, *supra*, following 2 Kent, Comm. 340.